Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

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The Commission issued a Public Notice on Sept. 1 seeking further public comment on two issues: (1) the relationship between open Internet protections and services that are provided over the same last-mile facilities as broadband Internet access service ("specialized services") and (2) the application of open Internet rules to mobile wireless Internet access services, which have unique characteristics related to technology, associated application and device markets, and consumer usage.[1]

I. SPECIALIZED SERVICES

On May 6, Chairman Genachowski vowed that his "narrow and tailored" Third Way approach would preserve the "longstanding consensus" that the free market for the Internet and other interactive computer services should remain unfettered by regulation. Moreover, he promised that, if enacted, his proposal would prevent "regulatory overreach" and "give providers and their investors confidence that this renunciation of regulatory overreach will not unravel."[2]

[1] Further Inquiry Into Two Under-Developed Issues in the Open Internet Proceeding (Sept. 1, 2010) (*Public Notice*) *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db0901/DA-10-1667A1.pdf, at 3.
[2] Julius Genachowski, "The Third Way: A Narrowly Tailored Broadband Framework" (May 6, 2010) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

Most students of regulatory policy realize that regulation must continuously evolve in ever-increasing complexity to prevent regulated entities from finding loopholes. Alfred E. Kahn, for example, has warned about "the inexorable tendency for regulation in the competitive market to spread." He gave the following example from his experience as the last chairman of the former Civil Aeronautics Board to illustrate the point:

> Control price, and the result will be artificial stimulus to entry. Control entry as well, and the result will be an artificial stimulus to compete by offering larger commissions to travel agents, advertising, scheduling, free meals, and bigger seats. The response of the complete regulator, then, is to limit advertising, control scheduling and travel agents' commissions, specify the size of sandwiches and seats and the charge for inflight movies. Each time the dyke [sic] springs a leak, plug it with one of your fingers; just as a dynamic industry will perpetually find ways of opening new holes in the dyke, so an ingenious regulator will never run out of regulatory fingers.[3]

The Commission now finds itself in a familiar predicament, i.e., how can it successfully regulate broadband Internet access service if providers are free to offer specialized services that are substantially similar – "but do not technically meet the definition" – of the regulated service?

The "policy approaches" identified in the Public Notice have all been used in the past to either limit the ability of telecommunications carriers to develop and deploy new services or to protect their competitors from full and fair competition.

Incidentally, regulation which shields commercial rivals from full competition is an indirect form of corporate welfare for the shielded entities. When government engages in such behavior, it is "picking winners and losers" and promoting unhealthy client relationships with private entities. The client is beholden to the commission, because it derives a commercial advantage from regulation. Typically the client invests heavily in its relationships with regulators and legislators on the relevant congressional oversight committees in an effort to

[3] Thomas K. McCraw, Prophets of Regulation: Charles Francis Adams; Louis D. Brandeis; James M. Landis; Alfred E. Kahn (Belknap Harvard, 1984) at 272.

protect and expand its regulatory advantage. In the worst-case scenario, an agency finds itself working harder on behalf of the entities it regulates than for consumers. For example, Stephen G. Breyer recounts how during the deliberations leading to airline deregulation, a survey of how the CAB's Bureau of Enforcement spent its time revealed that 60 percent was devoted to trying to stop air fares that the Bureau thought were too low, and only about 3 percent investigating consumer complaints – including complaints that fares were too high.[4] Breyer documents ample evidence that fares in general were too high. Deregulation solves this problem.

The Public Notice states that one of the areas upon which the Open Internet proceeding appears to have narrowed disagreement on key issues is that

> in light of rapid technological and market change, enforcing high-level rules of the road through case-by-case adjudication, informed by engineerging expertise, is a better policy approach than promulgating detailed, prescriptive rules that may have consequences that are difficult to foresee.

Yet that's exactly the opposite of what the Commission is suggesting in its "policy approaches." The prospect of heavy-handed regulation likely will inhibit infrastructure investments needed to expand broadband access in direct contradiction of the Commission's own goal of "promoting private investment and encouraging the development and deployment of new services that benefit customers."[5] Inhibiting investment jeopardizes jobs.

A recent analysis from the Phoenix Center shows that a mere 10 percent shock to capital expenditures in the information sector could result in an average loss of about 327,600 direct and indirect information-sector jobs per year in the following five years.[6]

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[4] Stephen G. Breyer, Regulation And Its Reform (Harvard Univ. Press, 1982) at 338.

[5] *Public Notice* at 3.

[6] T. Randolph Beard, George S. Ford, Hyeongwoo Kim, "Jobs, Jobs, Jobs: Communications Policy and Employment Effects in the Information Sector," *Phoenix Center Policy Bulletin No. 25* (October 2010), *available at* http://www.phoenix-center.org/PolicyBulletin/PCPB25Final.pdf.

II. MOBILE WIRELESS

The open Internet proceeding has produced no compelling evidence that it makes any sense to prohibit mobile wireless providers from treating lawful traffic in a discriminatory manner if necessary to relieve congestion. These providers are struggling to squeeze an exponentially rising tide of broadband traffic from smartphones and other devices through limited airwaves. Regulation will not solve the problem of insufficient spectrum.

My colleague George Gilder recently noted,

> In practice, actual network neutrality and access are determined not by the laws of the land but by the laws of network abundance and scarcity. With sufficient investment in bandwidth, carriers will have no economic incentive to exclude content from an unaffiliated provider. When bandwidth is scarce, carriers will have to allocate, ration and set priorities regardless of what the rules say, slowing everything down to the lowest common denominator. Network neutrality is particularly inappropriate for the booming wireless sector, which is the hope of underserved rural areas and needs to prioritize packets because wireless bandwidth always tends to be scarce.[7]

A. Transparency

As a general matter, it is far from clear that mobile subscribers are in need of transparency regulation. The stunning decline in the average price of mobile minutes of use and increases in minutes of use and subscribers since mobile wireless services were deregulated during the Clinton administration suggest that consumers by-and-large are extremely satisfied with mobile services.

If regulation is "appropriate," then rather than expanding the jurisdiction of the FCC – an agency which was created to regulate monopolies and manage scarcity, a more sensible approach would be to repeal the telecommunications common carrier exemption from the FTC Act.[8]

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[7] George Gilder, "Cap and Trade for the Internet," *Wall Street Journal*, (Mar. 15, 2010) *available at* http://online.wsj.com/article/SB10001424052748704131404575118100783269306.html.

[8] Prepared Statement of the Federal Trade Commission before the Committee on Commerce, Science, and Transportation, United States Senate (Apr. 8, 2008) *available at* http://www.ftc.gov/os/testimony/P034101reauth.pdf, at 20-21.

Unlike the FCC, the FTC was created to supervise unfair and deceptive acts or practices and unfair methods of competition in competitive industries. Mobile wireless is a competitive industry. Treating all competitive industries the same would promote uniformity and predictability.

The FTC has testified that technological advances have blurred the traditional boundaries between telecommunications, entertainment, and high technology, and convergence is likely to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to interconnected communications, information, entertainment, and payment services.[9]

B. Devices

A paper by Rysavy Research observes that there is continual improvement in device capabilities and that maximum network capacity only occurs when capabilities such as more efficient use of spectrum are embedded across all devices connecting to the wireless network. Otherwise, a subgroup of users who choose less-efficient devices curtail everyone else's experience and mitigate their own. Allowing any device could undermine investment in expanded network capacity and unfairly shift network costs to subscribers who are using more efficient devices.[10]

CONCLUSION

With respect to specialized services, it is probably impossible for the Commission to prevent broadband providers – in the Commission's words – from "bypassing open Internet

[9] Id.

[10] "Net Neutrality Regulatory Proposals: Operational and Engineering Implications for Wireless Networks and the Consumers They Serve," *Rysavy Research* (Jan. 14, 2010) *available at* http://www.rysavy.com/Articles/2010_01_Rysavy_Neutrality.pdf at 16-17.

protections," "supplanting the open Internet" or engaging in "anti-competitive conduct" without resorting to heavy-handed regulation, which most observers agree would jeopardize jobs and inhibit investment in advanced networks. The logical conclusion is for the Commission to resist the temptation to regulate.

Broadband providers already have an economic incentive to provide fast, reliable access to the most appealing content, applications and services the Internet has to offer – whether it's theirs or someone else's. Previous attempts to create "walled gardens" online have failed not because a regulator objected but because consumers weren't interested. If broadband vendors do try to discriminate against unaffiliated content, application and service providers for selfish purposes, they will likely face an antitrust probe.

Mobile wireless providers must retain maximum flexibility to manage their networks in light of the unique challenges they face in terms of variations in signal quality, unpredictable loading in cell sites and much lower overall network capacity.

In the case of both wireline and wireless providers of broadband Internet access, the best thing the Commission can do is maintain current incentives for private investment in additional network capacity and free up more spectrum for wireless broadband services.

Respectfully submitted,

/s/

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